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THE LAW OF DISAFFECTION IN INDIA.

There has been no case in recent times which has excited such keen interest throughout the length and breadth of India as the recent trials for sedition in Bombay, and especially the case of Mr. Tilak. The prosecution of Mr. Tilak was the second of the kind in the country since the enactment of S. 124-A of the Indian Penal Code in the year 1870. The first prosecution undertaken by the Government under this section was in the case of the editor of the *Bangobasi* in the year 1893. The want of unanimity among the jury induced the Judge to discharge them, and an apology being made by the editor, the prosecution was withdrawn. But while the editor of the *Bangobasi* was a man unknown to fame, the name of Mr. Tilak has been familar to people throughout the country, and the high social position and attainments of Mr. Tilak have attracted a vastly greater amount of interest to his trial. Apart, however, from every circumstance of personality, Mr. Tilak's case is of the deepest interest in its bearing upon the question of the freedom of the Press. We have no intention of discussing the propriety of Mr. Tilak's conviction or the question whether he was really guilty of the charge laid against him. The larger question to our mind is, whether the interpretation of the law by *Strachey*, J., is correct; and we propose to deal only with the several questions of law raised in these trials. No question of law that has ever come before the courts has been so important as the one raised by these trials as to the meaning of the word *disaffection*. The question is one which vitally affects the liberty of the Press, and must, therefore, necessarily affect the progress of the country. But for our knowledge of judges in India and of the disposition of many of them to believe in their infallibility, we should find it difficult to understand how a question of such far-reaching consequences could be considered

not sufficiently important to merit the attention of an appellate court. We have known numerous cases in England in which, even when questions of comparatively much less importance arose, the judges have expressed a desire that their decisions should be carried up to higher tribunals and submitted to the scrutiny of the appellate authorities; and in cases in which no appeals lay, judges have often expressed a regret that their decisions were not open to the examination of higher tribunals. In the trial of criminal cases, doubtful questions of law are always reserved by the presiding judge, and these questions are argued before a bench of several judges. While an English judge welcomes criticism and examination of his judgments by an appellate court, there is nothing that a judge in India dislikes so much, as the possibility of a reversal of his judgments. Our Indian judges are also blessed with that happy frame of mind which seldom entertains a doubt. We must confess our inability to understand the refusal of *Strachey*, J., to reserve the points of law arising in the case for the opinion of the other Judges except on the supposition that, according to his opinion, the point was plain beyond all doubt, or was of no moment. As a matter of fact, however, the points arising in the case are neither free from doubt, nor unimportant. The refusal of the Advocate-General of Bombay to certify that the case was a fit one for review forcibly illustrates the utter inexpediency of an officer who is charged with this duty being requested by the Government to conduct prosecutions. It is hardly likely that a lawyer who has to conduct a prosecution, however fair-minded he may be, can keep his mind unbiased and preserve that judicial temperament which is necessary to the discharge of the duties imposed by S. 26 of the Letters Patent. Nor again can we understand the decision of the Chief Justice and the other two Judges of the High Court refusing leave to appeal to the Privy Council. The learned Judges point out, very properly, that it is only when an important or doubtful question of law arises, or when there has been a miscarriage of justice that an appeal to the Privy Council can be allowed. It is difficult to accept the opinion of the learned Judges that these conditions were not fulfilled in the case before them. The most singular part of the order of the learned Judges is that in which they say that it has not been alleged that there was a miscarriage of justice. Mr. Tilak's contention throughout was that

S. 124-A was not correctly interpreted by the Judge who presided at the Sessions, that according to a correct interpretation of the law his case did not fall within the terms of S. 124-A, and that he was improperly convicted. The petition for leave to appeal to the Privy Council set forth the various grounds of objection to the Judge's interpretation of the section, and we cannot see what other meaning can be put upon Mr. Tilak's petition, except that he contended that his conviction was not legal and just. Do the learned Judges require that it should be stated expressly in the petition that there has been a miscarriage of justice, and that it is not enough, if it can be gathered from the tenor of the whole petition? Is it possible that the Judges think that a conviction can be just without being legal? The only justice that lawyers and judges are concerned with is justice according to law, and a miscarriage of justice means a miscarriage of justice according to law. There are no doubt cases in which, notwithstanding some error, defect or irregularity of procedure, it is said that there has been no miscarriage of justice. But where it is alleged that the section creating an offence and making it punishable has been misinterpreted, the allegation, if well founded, goes to the very root of the case and proves a miscarriage of justice. The argument of the learned Judges displays a narrow-minded technicality altogether inconsistent with the dignity of the highest court in the land. Information has reached this country that the Privy Council have also refused leave to appeal, but the grounds of such refusal are not before us. Meanwhile, another decision has been passed by the Bombay High Court in the *Pratoda* appeal which, so far as one can gather from the newspaper reports, considerably departs from the view taken in the Tilak case. The same question has, we believe, been raised in an appeal from Moradabad to the Allahabad High Court, and it remains to be seen what view the Allahabad High Court will take.

The first question that we have to consider is, what is the construction to be placed upon S. 124-A of the Penal Code. The section runs as follows:—

"Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite feelings of disaffection to the Government established by law in

British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added or with fine."

"*Explanation.*—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause."

We shall dispose of the simplest question first. Though the word *Government* is defined in S. 17 of the Code as denoting "the person or persons authorized by law to administer executive government in any part of British India," we do not think that in the words "*the government established by law in British India,*" it bears that sense. It would be unusual to speak of a person as established by law, and the word *government* can only refer to the *system* of government, apart from the men composing it. The disaffection contemplated by the section is not a disaffection to individuals merely, however high-placed they may be, but a disaffection to the existing political system of the country.

The next question is, what is meant by *disaffection*? *Strachey*, J., defined *disaffection* as meaning simply the absence of affection. This definition, however, he was obliged to confess, was wrong, as will appear from the order of the three Judges who disposed of the application for leave to appeal to the Privy Council. Then, he stated that *disaffection* meant hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. The learned Judge further said that the amount or intensity of the disaffection was absolutely immaterial, except, perhaps, in dealing with the question of punishment. It appears to us that this definition proceeds rather upon the etymology of the word than upon its established popular and technical acceptation. As Mr. Pugh pointed out in his speech for the defence, the only two matters in regard to which the word *disaffection* is used are with reference to regiments and to the relation between the subjects and the Government. A regiment is said to be disaffected when the men are not disposed to obey lawful orders, or are ready to desert and to go over to the enemy; and

subjects are said to be disaffected, only when they desire to resist or subvert the Government. The word *disaffection*, as used in this section, denotes, in our opinion, a state of mind among the people or any class of them in which they are not disposed to obey the authority of Government, or to support the authority of Government against attempts to subvert it. But even supposing that the word *disaffection* can possibly include any form of dislike or ill-will, it is restrained by the language of the explanation, that such feelings only amount to disaffection, as are incompatible with a disposition to render obedience to, and to support the lawful authority of, the Government against unlawful attempts to subvert or resist that authority. The most grievous mistake committed by the Judge consists in treating of the amount or intensity of the disaffection as absolutely immaterial and in treating the explanation as an exception with a strictly defined and limited scope. The view taken by the learned Judge is not merely logically incorrect, but lands him in anomalies and inconsistencies, and the privileges conceded by him as well as everybody else to what he calls honest journalism are not strictly reconcilable with his interpretation of the law.

The learned Judge lays stress upon the word *measures* found in the explanation. The learned Judge holds that if a writing cannot be said to be a comment on the measures of Government, the explanation is altogether inapplicable, and that it will fall within the first part of the section, if it is calculated to excite any feeling of dislike or ill-will, however mild, towards the Government. If the writing instead of commenting upon the measures of Government contains reflections upon the Government itself, its existence, its essential characteristics, its motives or its feelings towards the people, it is held to be outside the protection granted by the explanation. In construing the explanation, the first thing to be considered is what is meant by *measures*. The word is defined in Webster as "a step or definite part of a progressive course or policy; a means to an end; an act designed for the accomplishment of an object." Does the word *measures* include institutions or not? The learned Judge himself concedes that the explanation would protect criticism of institutions. According to the ordinary acceptation of the term *measures*, it would not include institutions. It may, perhaps, be said that institutions are in many cases the results

of past measures, and therefore fall within the scope of the explanation. But there are cases where institutions have existed from time immemorial and cannot be directly traced to any measures. Can such institutions be said to be outside the scope of the section? Suppose a writer criticises the present constitution of the service in any particular department and the efficiency of the members of that service as a body and finds fault with the Government for permitting such a state of things, can it be said that, inasmuch as it is a criticism of men as distinguished from measures, it falls outside the explanation? Again, suppose the Government omits to take the necessary steps for the suppression of plague or famine, and such omission is criticised, can the omission to take measures be itself regarded as a measure of Government? It would be an abuse of language to speak of omissions as measures, and yet no one can deny that a journalist has a right to condemn the Government for such omissions and would be justified in blaming the Government for its indifference to the welfare of the people. It is clear from the cases we have mentioned, either that the word measures must be construed in a loose sense so as to comprehend anything and everything, or that the explanation must be taken as only illustrative of the classes of cases which will not fall within the first part of the section. It seems to us that the more proper construction is to treat the explanation as only illustrating the classes of cases which would not amount to disaffection. It is probable that the word *measures* was used in the explanation, because criticisms of measures were more common than criticisms of men or institutions. But at the same time, it is clear that no emphasis could have been laid on the word *measures*. This will be clear if the explanation is put in the positive instead of the negative form. Put in the positive form, the explanation will read: 'Such a disapprobation of the measures of Government as is incompatible with a disposition to render obedience to the lawful authority of the Government, etc., is disaffection. Therefore, the making of comments on the measures of Government with the intention of exciting this species of disapprobation is an offence within this clause'. If a person expresses disapprobation of the men constituting the Government or their motives or the institutions of Government, and such disapprobation is incompatible with a disposition to render obedience to the Government, the disapprobation

would not fall within the explanation in this form and would not therefore, according to the reasoning of *Strachey*, J., amount to disaffection, even though the disapprobation might be incompatible with a disposition to render obedience. But this conclusion will not, we think, be admitted by the learned Judge, and it can be denied only on the supposition that no stress is to be laid on the word *measures.* The conclusion that we have pointed out is at least as good a logical inference from the explanation as the conclusion of *Strachey*, J., and amounts to a *reductio ad absurdum* of the learned Judge's view. Simply because a particular kind of disapprobation is pronounced to be not disaffection, it does not logically follow that all other kinds of disapprobation are disaffection. We are, therefore, led to the conclusion that the language of the explanation must be taken to be co-extensive in its scope with the language of the first part of the section. If the section is qualified by the explanation, a person will not be guilty under the section, unless the feelings of disaffection excited or attempted to be excited would be incompatible with a disposition to render obedience to the lawful authority of Government and to support that authority against unlawful attempts to subvert or resist it. If the section is interpreted in this way, there is no vagueness or uncertainty about the amount or intensity of the feelings of disaffection which should be created in order to render a person liable under the section. Our construction is fully supported by the authority of that distinguished Judge *Sir James Fitz James Stephen*, perhaps the greatest authority in criminal law in this generation. The opinion of *Sir James Stephen* is, no doubt, not binding upon the courts, but it should certainly induce any judge to hesitate in coming to a different conclusion. In moving the final report of the Select Committee on the Bill to amend the Penal Code, *Sir James Stephen* pointed out that under the section 124-A, then proposed to be added, a person might say what he liked about Government measures or public men and might publish or speak whatever he pleased, so long as what he said or wrote was consistent with a disposition to render obedience to the lawful authority of Government. The same view was adopted by Sir Comer Petheram, the late Chief Justice of Bengal in the *Bangobasi* case (I.L.R., 19 C., 35, 44). In his charge to the jury, the learned Judge said, "If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are

addressed a disposition not to obey the lawful authority of the Government or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words, or any feeling of disaffection, in fact, produced by them". Suppose a writer in the Press complains of the oppressiveness of the land tax and points out that the administration of that department of revenue betrays an utter want of regard for the convenience or well-being of the people, but at the same time declares that notwithstanding its shortcomings, however serious, the British Government is the best for the country and that he would prefer it to any other Government, can he be held guilty of an offence under this section? If he is not guilty, would it make any difference if he did not expressly declare his preference for the English Government, but it could be reasonably inferred or implied? Such an implication may, we think, be fairly raised in the case of most of the criticisms, that appear in the Press about the Government.

Mr. Justice Strachey seems to think that there is a sharp distinction between disapprobation and dislike. But disapprobation in every form implies dislike. To say that you disapprove of a measure is to say that you dislike it. Dislike of a measure must be necessarily attended by dislike of the person responsible for the measure, in so far as that part of his conduct is concerned. If, notwithstanding our disapproval of a person's conduct in a particular matter, we like him, it is because our approval and appreciation of him in other respects are strong enough to overcome the dislike that is likely to be and is caused by his conduct in that particular matter. Our likes and dislikes to persons and institutions are extremely complex feelings and are generally the resultants of a variety of conflicting emotions. The creation of a feeling of dislike against the Government in any particular matter of administration must not be confounded with the creation of a dislike against the Government generally, or with the creation of a spirit of intolerance of the Government.

The view we have taken appears to us to be in line with the English authorities upon the subject and to be the only one

consistent with that freedom of the Press which is so essential to progress in modern times. If the language of the section were free from all doubt, there would certainly be no use in referring to the English decisions upon the subject. But when the language is open to doubt and admits of a wider or narrower construction, help may be fairly sought for from the English authorities.

In the English law the publication of anything calculated to excite disaffection is treated as a seditious libel. A seditious intention is defined as "an intention to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom as by law established or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or in State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or its constitution as by law established with a view to their reformation or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out in order to their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between classes of Her Majesty's subjects is not a seditious intention". Stephen's Digest of the Criminal Law, 5th Edition, Art. 95. It is clear from this definition that where the object of a publication is only to excite the people to seek by lawful methods the alteration of any matter in Church or State, it does not amount to a seditious libel and that it is only when people are counselled to have recourse to other than lawful methods that the publication will be held to be seditious. Stray passages can no doubt be found in some of the decisions which might suggest a wider interpretation of the term *sedition*. But, there can be no doubt that, if the decisions are read as a whole, they insist upon the necessity of the publication being calculated to induce people to have recourse to other than constitutional methods. In *Regina* v. *Collins*,

9 Car. & P., p. 456, *Littledale*, J., laid down that the people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult. The test adopted is whether the publication meant that the people should make use of physical force as their own resource to obtain justice and meant to excite the people to take the power into their own hands and meant to excite them to tumult and disorder. The two most recent cases, however, are the case of *Regina* v. *Sullivan* and the case of *Regina* v. *Burns*. In *Regina* v. *Sullivan*, 11 Cox's Criminal Cases, p. 45, *Fitzgerald, J.*, defined sedition at considerable length, and his language has been quoted frequently in subsequent cases: "Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and stir up opposition to the Government and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war, to bring into hatred or contempt the Sovereign or the Government, the laws and the constitution of the realm and generally all endeavours to promote public disorder."

For instance, with regard to the administration of justice, a journalist is privileged to point out that the administration of justice is bad; but he should not use language which would indicate contempt of the laws of the land. What is condemned is the attempt to produce such a hatred or contempt of the laws of the land as might induce the people to take the law into their own hands or to refuse to obey the law. The learned Judge pointed out, "If the law of libel was carried out in the full strictness of its letter, it would materially interfere with the freedom of the Press. Hence, a great deal depends upon the forbearance of Government, the discretion of judges, and above all on the protection of juries.

For instance, it is open to the community and to the Press to complain of a grievance. *Well, the mere assertion of a grievance tends to create a discontent, which, in a sense, may be said to be seditious. But no jury, if a real grievance was put forward and its redress bonâ fide sought, although the language used—might be objected to—no Jury would find that to be a seditious libel. It might be the province of the Press to call attention to the weakness or imbecility of a Government, when it was done for a public good.* How closely that trenches on the law of sedition. And yet such writing, when *bonâ fide*, would receive protection from a jury."

In *Regina* v. *Burns*, 16 Cox's Criminal Cases, p. 365, the law as laid down by *Fitzgerald*, J., in *Regina* v. *Sullivan* was adopted by *Mr. Justice Cave*, and the question which the jury were asked to consider was whether it was the intention of the accused to excite the people to violence to a breach of the law. It is thus clear that, according to the English law, the primary test of sedition is whether the writing complained of tends to produce a spirit of lawlessness or disobedience to Government. Though the offence of exciting disaffection against the Government is called the publication of a seditious libel in the English law, it is not really a branch of the law of libel. Seditious libel cannot be defined merely as libel directed against the Government. It is an offence falling under an entirely different category, under the class of offences against the State. A corporation as such cannot complain of an injury to reputation (*Mayor of Manchester* v. *Williams* [91] 1 Q. B. 94). A seditious libel is an offence against the State, not because it lowers the reputation of the State, but because it tends to produce a spirit of disloyalty likely to be subversive of the foundations of Government.

In a prosecution under S. 124-A, it is no doubt unnecessary to prove that feelings of disaffection were actually excited, as the section renders punishable even an unsuccessful attempt to excite. But as pointed out by *Mr. Justice Cave* in *Regina* v. *Burns*, the moral justification for a prosecution by the Government for this offence must be that it has excited such feelings. Of this, however, there was no evidence in the case of Mr. Tilak. There was absolutely no evidence to show that the unfortunate murders of Mr. Rand and Lieutenant Ayerst were in any way the result of the

articles complained of. In this connection we must express our disapproval of the reference by the learned Judge to those murders in his charge to the Jury for the purpose of showing the state of the country and of the time at which the articles were published. The articles were published on the 15th of June, and the murders were committed on the 22nd. If the Poona tragedy had occurred before the articles were published, the reference might be justified. Mr. Tilak could not be expected to have foreseen the events of the 22nd of June; and the knowledge of surrounding circumstances with reference to which Mr. Tilak's conduct should have been judged was his knowledge at the time of publication of the articles, and not at a subsequent date. We cannot help believing that this unfortunate reference must have seriously prejudiced the accused.'

Another question which arose in the *Vaibhava* case was whether evidence was admissible to prove the truth of the allegations of fact in the incriminated articles. It is true that in a prosecution for libel the truth of the imputation is no defence. It is equally true that in a prosecution for a seditious libel, the truth of the imputation is no defence. But it does not follow that the truth of the allegations in a seditious libel is irrelevant in evidence. If the allegation was in fact unfounded and proved to be so to the knowledge of the writer, would it not go a long way towards establishing the disloyal intention dealt with in the section? In the same way if the allegations related to real grievances, it would be an important element in determining whether the intention of the writer was not to call the attention of the Government in perhaps pointed language to the existing grievances, so that they might be redressed. A man who writes under the indignation of a real grievance might be excused for some strength of language which would not be permitted to a man without a grievance. The truth of the allegation would, to a considerable extent, tend to show that the intention of the writer was merely to secure the removal of grievances and not to produce disaffection. We do not say that it would necessarily establish the innocence of the writer, but it would be an important element in determining it. The refusal of *Strachey*, J., to let in evidence of the allegations made by the *Vaibhava* must be regarded as a blunder legally and politically, legally for the reasons we have already given, and politically because

it has led to an impression that the Government was not prepared to face judicial inquiry into its methods of administration of the measures for the suppression of the plague.

In conclusion, we cannot help expressing our regret that the trial of such an important case should have been entrusted to a comparatively inexperienced Judge, however learned.

ILLEGITIMATE CHILDREN.—THEIR RIGHT TO MAINTENANCE UNDER THE HINDU LAW.

The law everywhere gives some rights to illegitimate children as against those who are responsible for their existence. The mother is always bound to maintain them; and the father too, whenever he can be ascertained. The principle underlying this rule is twofold: (1) The universally recognized rights of children as against their parents to be maintained, protected and educated by them are extended to bastards; for, though they are not looked upon as children for any civil purposes, yet the ties of nature should not be ignored and the support of the offspring by the parent is a matter of natural obligation (2 Stephen's Commentaries, 312): (2) Moreover, the enforcement of the duty to maintain one's dependents is a mode of preventing vagrancy, or at least of preventing its consequences (3 Stephen's History of the Criminal Law, 342). To make the law effective in this respect, a summary remedy is usually available to enforce these rights. [Criminal Procedure Code, ch. XXXVI, and the Vagrancy Acts (43 Eliz., ch. 2; 5 Geo. I, ch. 8; 59 Geo. III. ch. 12; 5 Geo. IV., ch. 83; 4 and 5 Will. IV., ch. 76; 31 and 32 Vict., ch. 122) in England.] No doubt, as pointed out by Mr. Stokes, vagrancy is not and never has been an offence in India (2 Anglo-Indian Codes, 29). But there is nothing to prevent the law from seeking to prevent or remove the causes that may lead to vagrancy without making vagrancy a crime. The Roman Law and the English Law recognize the right of bastards to maintenance by their parents (Hunter's Roman Law, 677; 2 Stephen's Commentaries, 312). The Hindu Law goes further and confers on the *dāsī-putra* of a Sudra the

right of inheriting to his putative father in certain cases, either because of the laxity of the marriage tie among Sudras (Mayne, s. 505), or because of the limited importance attached by them to ceremonial offerings (I. L. R., 12 M., 401, at 403); his rights, however, are naturally smaller than those of a legitimate son. The laws of the countries on the continent of Europe permit the legitimation of bastards by subsequent marriage with the concubine. The Roman Law recognizes two more ways of legitimation. The English Law regards children conceived out of wedlock as legitimate if born after marriage, but does not permit legitimation of the offspring properly so called, *i.e.*, after birth, except by a special Act of Parliament [Mackenzie's *Studies in Roman Law*, Part I, ch. VII; 2 Stephen's Commentaries, 299].

The following is the text of the Mitakshara on the subject:—

Rights of son by a Female Slave in the case of a Sudra's estate.

1. The author next delivers a special rule concerning the partition of a *Sudra*'s goods (Here comes Yajnavalkya's Text, *Slokas* 133*a* and 134) * * * * * * * * *

3. From the mention of a Sudra in this place, [it follows that] the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance. (*Colebrook's Mitakshara*, I, xii).

Among the three regenerate classes of Hindus, *viz.*, Brahmins, Kshatriyas and Vaisyas, illegitimate sons are entitled only to maintenance (*Raja Parichat* v. *Zalim Singh*, L. R., 4 I. A., 159; *Chuoturya Run Mardun Syn* v. *Sahub Purhulad Syn*, 7 M. I. A., 18). The Mitakshara puts in the qualification—"if they be docile." In *Hargobind Kuari* v. *Dharam Singh* (I. L. R., 6 A., 329), it is held that the right of illegitimate sons to receive maintenance depends on obedience to the head of the family, not on their age or capacity to earn. "Obedience" is defined to be such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong. The Madras High Court has held that an *anandravan*, whose right to maintenance does not differ from the right of a member of an ordinary Hindu family to a perception of some portion of the income of the family property,

could not be refused maintenance on the ground of misbehaviour. (*Putanvitil Teyan Nair* v. *Putanvitil Ragavan Nair*, I. L. R., 4 M., 171.) These two cases point to a distinction between the right to maintenance of an illegitimate son of a twice-born to whom the above text of the Mitakshara specially applies and the right of co-parceners to maintenance which, being a substitute during co-parcenary for the right to a share on partition, cannot be affected by any circumstance that cannot affect the larger right. The question, whether the right to maintenance of persons who are neither co-parceners nor illegitimate sons of a twice-born is controlled by any such qualification, suggests itself, but is touched by no authority. It is submitted that the text should be strictly construed and ought not to be extended to cases other than the one specifically dealt with by it.

The right of an illegitimate son to maintenance from the family property is a purely personal right and does not descend to his son. *Balwant Singh* v. *Roshan Singh*, I. L. R., 18 A., 253.

Whether an illegitimate son of a twice-born can be an heir by a special usage is an open question. In *Bhaoni* v. *Maharaj Singh* (I. L. R., 3 A., 738), such usage was set up by the defendant, the illegitimate son, against the claim of the plaintiff, the widow of the last owner. The High Court found against the custom, reversing the finding of the Sub-Court. The same finding was arrived at in the only two other cases where the usage was put in issue. [*Mohun* v. *Chumun*, 1 S. D. 28 (37); *Pershad* v. *Mutiesree*, 3 S. D., 132 (176)]. Mr. Mayne seems to doubt the existence of any such exception by special usage. It would certainly require very strong evidence to make out such a custom which contravenes the general law.

The right of illegitimate children to maintenance, unlike the right of the *dāsī-putra* of a Sudra to inherit to his putative father, does not depend on the nature of the connection of which they are the offspring. Whether the connection is legal or illegal, they are alike entitled to be maintained, provided they are not entitled to succeed as heirs. Hence all illegitimate children of persons of the regenerate classes and the illegitimate children of Sudras, not being *dāsī-putras*, have a right to maintenance, even though the connection from which they sprung may have been adulterous or incestuous. (*Muthusamy* v. *Venkatasubba*, 2 M. H. R., 293; affirmed 12 M. I. A.;

203; *Chuoturya* v. *Sahub Purhalad*, 7 M. I. A., 18; *Rahi* v. *Govind*, I. L. R., 1 B., 97; *Viramuthu* v. *Singaravelu*, I. L. R., 1 M., 306; *Kuppa* v. *Singaravelu*, I. L. R., 8 M., 325; *Hargobind* v. *Dharam*, I. L. R., 6 A., 329; *Muthusamy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya*, 12 M. I. A., 203.)

The obligation to maintain illegitimate children seems to be limited to the case of their being infants. Their right cannot be put higher than that of a wife's son. The latter's right to be maintained out of ancestral property as long as the co-parcenary continues stands on a special footing. He can enforce partition at any time, but he may also sue for maintenance, if willing to continue as a member of an undivided family; and we say this with due deference to the Bombay High Court which has held that a co-parcener who is in a position to sue for a share of the family property cannot sue for maintenance (*Himmatsing* v. *Ganpat Sing*, 12 B. H. C. R., 96, *note; contra* Mayne, S. 416). In the absence of ancestral property, the legitimate son's right to maintenance stands on the same footing as that of the illegitimate son. The absence of co-parcenary rights in either case puts them on the same level. "Where there is no property but what has been self-acquired, the only parties whose maintenance out of such properties is imperative, are aged parents, wife and minor children." (The Mitkshara on Subtraction of Gifts.) It has accordingly been held that a father is under no legal obligation to maintain his adult son out of his self-acquired property (*Ammakkannu* v. *Appu*, I. L. R., 11 M., 91; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*, I. L. R., 2 B., 346, at 350), even though the son was labouring under a temporary illness (*Prem Chánd Pepara* v. *Hoolas Chand Pepara*, 12 W. R., 494). Likewise, an adult illegitimate son is not entitled to maintenance (*Nilmoney* v. *Baneshur*, I. L. R., 4 C., 91). *Hargobind Kuari* v. *Dharam Singh* (I.L.R., 6 A., 329) decides the other way. But the only ground on which the decision is based is that, as the Mitakshara declares an illegitimate son entitled to maintenance if he be docile, docility is the only qualification necessary to entitle him to maintenance. In *Kuppa* v. *Singaravelu* (I. L. R., 8 M., 325), though the case was one in which an adult illegitimate son got a decree for maintenance, the point as to his age was not taken, or decided.

Marriage between men of a superior caste and women of an inferior caste was sanctioned by the early Hindu Law. Such marriage being now prohibited, the issue thereof (*anulomajas*) would be illegitimate, as the *pratilomajas* or issue of a marriage between women of a higher caste and men of a lower caste have always been. (*Gooroodas Bannerjee's Marriage and Stridhan*, pp. 162-163; *Brindavana* v. *Radhamani*, I. L. R., 12 M., 72). There is nothing in the Hindu Shastras prohibiting intermarriage between persons belonging to different sub-divisions of the same caste. The Privy Council have accordingly held that a marriage between two persons of the Sudra caste was not invalid, because they belonged to two different classes or divisions of that caste, or because the wife was the offspring of a bastard (*Inderun Valungypooly Taver* v. *Ramaswamy Pandia Talaver*, 13 M. I. A., 141). The same view was taken in *Ramamani Ammal* v. *Kulanthai Nachiar* (14 M. I. A., 346) and *Upoma Kuchain* v. *Bholaram Dhubi* (I. L. R., 15 C., 708). As observed by *Holloway*, J., in 1 M. H. C. R., 478 (from which 13 M. I. A., 141, was an appeal), it seems to be clear that the classes among whom intermarriage is prohibited by the Shastras are the four classes recognized by Manu and not the infinite sub-divisions of these classes introduced in the progress of time. In Calcutta, it was at one time held that the general Hindu Law prohibits marriage between sub-castes, and such marriage could be valid only by a special custom (*Melaram Nudial* v. *Thanooram Bamun*, 9 W.R., 552; *Narain Dhara* v. *Rakhal Gain*, I. L. R., 1 C., 1.) But these cases are inconsistent with the Privy Council decisions cited above and have been practically overruled by *Upoma Kuchain* v. *Bholaram Dhubi*, I. L. R., 15 C., 708. It is no doubt true that certain sub-castes are very particular as to intermarriage with other sub-castes and try to avoid it as much as possible. But the presumption will be very strong against a custom which imports a restriction on marriage not contemplated by the Shastras and not free from objection on grounds of public policy.

In Malabar the members of a tarwad are entitled only to maintenance out of tarwad funds, except the Karnavan who is the manager of the tarwad property. The children of a mother governed by the Marumakkatayam Law are entitled to be main-

tained by the tarwad to which their mother belongs. But it seems customary for the father to provide for the maintenance of his children, though the law treats it as only a moral obligation owing to the absence of legal marriage in Malabar. In such cases it is doubtful if, according to Malabar Law, the children can legally compel the father to maintain them till they attain majority, at any rate when the woman's tarwad is possessed of no means and the father is in possession of self-acquired property. A Nair woman's children by a man of a lower caste are treated as illegitimate and are not members of the tarwad (Ramachandra Iyer's Malabar Law, §§ 292-293). The children of a Nambudri Brahmin by a Nair woman kept by him would be his illegitimate children. The Hindu Law does not govern Malabar people, and the rights of illegitimate children to maintenance by the putative father will be governed by the Criminal Procedure Code, ch. XXXVI, unless the Malabar Law clashes with it.

The Criminal Procedure Code confers a statutory right to maintenance on wives and children who are unable to maintain themselves, whether legitimate or illegitimate, which right can be enforced in a summary way in a Criminal Court (s. 488) subject to the conditions therein provided. Illegitimate children, though the offspring of adulterous intercourse, are entitled to maintenance under the section (Weir, 1104). Does this provision confer any new right not already possessed under the law previous to the Code? In re *the petition of Luddun Sahiba* (I. L. R., 8 C., 736) answers the question in the affirmative. That case decides that, though under the law of the *Shea* sect of Mahomedans, a *mutta* wife is not entitled to maintenance, such a provision of the law does not interfere with the statutory right to maintenance given by S. 536 of the Code of Criminal Procedure (Act X of 1872). Considering that the object of the legislature in enacting the above section was to prevent vagrancy and its consequences, the decision of the Calcutta High Court seems to be right, since the result of the decision will be to carry out that object by filling up the blanks left by the law as it existed before the Act. But it must be noted, on the other hand, that a Criminal Procedure Code is a Code least likely to be intended to affect or create substantive rights, and Section 1 of the Code provides that, in the absence of any specific provision to the contrary, nothing in the

Act shall affect any special or local law in force at the time of the passing of the Act. The question will arise for decision with reference to the Malabar Law which does not confer any rights to maintenance on the illegitimate sons of a Nambudri Brahmin by a Nair woman as against the putative father and which is not certain as to the rights of children to be maintained by the father. No such question can arise with reference to the Hindu Law, as the section does not confer any other or larger right to maintenance than that already recognized by that law.

An illegitimate daughter is entitled to maintenance and marriage expenses, (*Salu* v. *Hari*, Bom. H. C. P. J. F. for 1877, p. 34) which may be made a charge on the shares of both legitimate and illegitimate sons (*ibid.* W. and B., 432). It would seem that, as in the case of the sister and the daughter, her maintenance after marriage would be a charge upon her husband's family; but, if they are unable to support her, she must be provided for by the family of her father (Mayne, s. 408). In *Parvati* v. *Ganpatrao Balal* (I. L. R., 18B., 177), it is observed that the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the texts; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference from the absence of any express provision for daughters is that they were not contemplated as having the same right (*per Sargent*, *C. J.*, and *Bayley, J.*, at p. 183).

T. JIVAJI.

NOTES OF INDIAN CASES.

Perumal Ayyan *v.* **Alagirisami Bhagavathar,** I. L. R., 20 M., 245. We are inclined to question the correctness of this decision with all respect to the learned Judges who decided the case. A period was provided for the payment of the money and in the meantime on default of payment of interest, both principal and interest were payable on demand. Suit was brought within the period of limitation from the due date as specified, but after the lapse of the period calculated from the date of default in payment of interest. There was no demand made. The learned Judges hold the suit barred. They say the time began to run from the date of default in the payment of interest and not from the due

date as specified in the bond. There is no doubt that in the case of a promissory note or bond payable on demand merely, no demand is necessary to give rise to a cause of action and time runs from the date of the note or bond as specially provided in the Limitation Act. But where a time is specified and the right of action might accrue at an earlier date on demand, a demand is necessary to give rise to a cause of action. The principle of *Hanmantram Sadhuram Pity* v. *Bowles*, I. L. R., 8 B., 561, and *Ball* v. *Stowell, Ib.* 2 A., 322, applies to the present case.

Appa Rau Sanaji Aswa Rau *v.* Krishnamurthi, I. L. R., 20 M., 249. We regret that the learned Judges should have felt themselves bound to follow *Veeramma* v. *Abbiah*, I. L. R., 18 M., 99. We have pointed out already that the *ratio decidendi* in that case is unsound. See 5 M.L.J. 145. And, though the conclusion in that case was supportable on the language of S. 7 of the Act, there is no similar restriction in the case of S. 5. There is very good reason, therefore, for holding that S. 5 may apply to a suit brought under S. 77 of the Registration Act.

Arumugam Pillai *v.* Arunachalam Pillai, I. L. R., 20 M., 254. Where a will is presented for registration after the death of the testator by his representative, the question arises whether the registering officer is at liberty to refuse registration on the ground of minority or lunacy of the testator, as authorized by S. 35 of the Act, in the case of documents generally. We are disposed to think with the learned Judges who decided the case that S. 41 of the Act which authorizes registration in the same manner of any other document only deals with the form of registration. The rules to be followed by the registering officer in determining whether registration should be allowed or not, are only those which are contained in S. 41. The registering officer has of course to be satisfied that the will was executed by the testator. It may be said that, unless the provisions of S. 35 are applied, there would be no provision for a registering officer making any enquiry whether the testator himself presents it for registration, and that if in that case S. 35 is to be applied so as to empower the officer to refuse registration if the testator appears to be a minor, an idiot or a lunatic, it may similarly have to be extended to the case where the representative of a testator presents a document for registration. It seems, however, that the power to determine whether the testator was a conscious agent in the execution of a will may be supposed to be involved in cl. *a* of S. 41.

Hanuman Prasad Singh *v.* Bhagauti Prasad, I. L. R., 19 A., 357. The principles upon which this case ought to be decided are well set out by the learned Judges who decided it. But they appear to us to have

gone wrong in the application. *Nobin Chunder's* case, 9 W. R., 505, approved by the Privy Council in *Srinath Kur* v. *Prosunno Kumari Ghose*, L. R., 2 I. A., 113, undoubtedly lays down the correct principle. But where the learned judges appear to us to have gone wrong is in supposing that the property alienated by the widow was not held by the alienee adversely to the daughter. It is true no doubt as regards the alienor that the property is not possessed by the alienee adversely, but under a derivative title. As regards the daughters who were the lawful successors to the estate, the possession of the widow's alienee was adverse just as much as if it was held by a trespasser against them from the moment of the death of the widow. The daughters' right, having become barred prior to the coming into force of Act IX of 1871, that right could not be revived by virtue of that Act; and as a result of the *Shivaganga Case*, which was also followed in *Mussummat Lachhan* v. *Anant Singh*, 22 I. A., 25, the daughters represented the estate, and when their right was extinguished, the right of the male reversioner was also extinguished. If the right of the daughters had not become barred when Act IX of 1871 came into force, it might well be contended that the male reversioners had 12 years from the death of the last female heir. It is unfortunate that the decision in *Sambasiva* v. *Raghava*, I. L. R., 13 M., 512, which was overruled on review, was not brought to their Lordships' notice, the decision on review not having been reported in the Indian Law Reports. See, however, 1 M. L. J. 392. That was an exactly similar case, and the possession of the alienee was rightly held to be adverse to the daughter, giving rise to a cause of action in her favour which became extinguished on the lapse of the statutory period. The decision in *Drobomoyi Gupta* v. *Davis*, I. L. R., 14 C., 323., is also based on the same principle. It is difficult to see why the possession of the alienee should be otherwise than adverse to the daughters who succeeded to the inheritance.

Balmakund *v.* **Sangari**, I. L. R., 19 A., 379. There is a very considerable misapprehension as to the true scope of S. 43 of the Code of Civil Procedure. It has nothing to do with suits against different defendants. It requires the whole of the claim in respect of the cause of action against the same respondents should be made once for all. Where the suit is first brought against one defendant and afterwards against another even upon the same cause of action, S. 43., does not bar the institution of the suit. No doubt where the defendants are jointly liable upon a cause of action, the rule in *King* v. *Hoare*, 13 M. and W. 494, followed in several subsequent cases, precludes a second action against some of the persons so jointly liable. But that is not S. 43; nor does the rule in *King* v. *Hoare* apply to cases other than those of joint liability.

The distinction was pointed out by *Hutchins* and *Brandt*, J. J., in *Umamaheswara* v. *Singaperumal*, I. L. R., 8 M., 376, though lost sight of in a recent case by *Subrahmania Aiyar* and *Davies*, J. J. In the case under notice, the Full Bench of the Allahabad High Court point out the true scope of S. 43 of the Act, though in that case they speak of there having been more than one cause of action. Whether, the cause of action is one or more than one, there can be no doubt that S. 43, does not apply to suits against different parties.

Queen Empress *v.* **Mannu**, I. L. R., 19 A., 390. The question which was the subject for consideration in this case by the Full Bench is one of considerable importance. It is to be regretted there should be a difference of opinion on a point of such material importance in criminal practice. We had occasion to note a similar divergence of opinion in connection with the question as to whether the reports of Police officers are the acts of public servants or the record of their acts so as to fall within the definition of public documents in S. 74 of the Evidence Act. In the present case we are disposed to favor the view adopted by *Bannerji* and *Aikman*, J.J., that statements recorded under S. 161 of the Code of Criminal Procedure by a Police officer if entered in a special diary, are not previleged ; but the accused person or his agents are entitled to see them. The Calcutta High Court has adopted the same view as the Judges who formed the minority in the case under notice. We must, however, confess that there is considerable force in the argument of *Edge*, C.J., and the Legislature, which has the admendment of the Code under consideration, has taken up the matter. The bill if it becomes law will enforce the view of the Chief Justice.

SUMMARY OF RECENT CASES.

Solicitor and client—Compromise of claim without consent of party invalid.

Macaulay *v.* **Polley**. [1897, II, Q. B. D. 122, C. A.]

A solicitor engaged by a client to bring an action, cannot without the consent of the party compromise the action with the other party, before action is brought.

The action was brought to recover compensation for personal injuries sustained by the plaintiff. He engaged a solicitor to conduct his suit. The solicitor thereon, before any action was brought, entered into negotiations with the defendant, and agreed to accept a sum of 15 guineas in settlement of the claim. The money was not paid over to the plaintiff

and he never consented to the compromise. The plaintiff commenced the action, but a motion was made to stay proceedings on the ground that the claim of the plaintiff had been satisfied.

Held; by the Court of Appeal (confirming the decision of *Grantham*, J.,) that the solicitor had no implied authority to compromise the claim under the circumstances stated.

Marriage, nullity of—Fraud—Pregnancy of wife at the time of marriage.

Moss *v.* **Moss.** [1897, Probate Division, 263. The President.]

In this case the petitioner sought to have his marriage with the respondent declared *null* and *void*, on the ground that she was pregnant by another man at the time of the marriage and that without any neglect on his part, he had been induced to enter into the marriage by the fraudulent concealment by the respondent of her pregnancy. The President after a very elaborate disquisition on the subject of the essentials of a valid marriage found the law to be against the petitioner and said "I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed."

The essentials necessary under the English law for the validity of a marriage, were thus stated by the President. "There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication, solemnisation, so far as the law deems essential. There must not be incapacity in the parties to marry, either as respects age or physical capability, or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others, renders the marriage void or voidable."

Often it is stated that a marriage is *null* and *void* if induced by fraud. But this statement has very many limitations. Although every marriage originates in a contract, what is effected is not a mere contractual relation but a status. Consequently, it would not be accurate to import the whole law of fraud, applicable to the formation and dissolution of ordinary contracts into the field of the so-called contract of marriage. The fraud, therefore, that is spoken of as a ground for avoiding a marriage is limted to such fraud as procures the appearance, without the reality, of consent, the simplest instance of such fraud being personation. In such cases the marriage is considered void, not because of fraud, but because of absence of consent. It should, however, be noted in this connection that the American Courts, which also base [their decisions on the common law of England have held a contrary view on this point.

Mortgage—Foreclosure decree—Redemption before date fixed.

Hill v. Rowlands. [1897, II. Ch. 361 C. A.]

In a foreclosure suit after judgment, the master, by certificate, found the amount due to the plaintiff on his mortgage for principal and interest up to the date of the certificate and for his costs, and also found the amount which will be due to the plaintiff for further interest up to the expiry of six calendar months from the date of the certificate, and appointed the last day of the six months for payment of the aggregate sum at the place and hour therein mentioned. After issue of this certificate the mortgagor applied to redeem before the expiry of the six months fixed in it, on payment of the sum found due for principal and interest up to date of the certificate, with subsequent interest up to date of payment only.

Held: by the Court of Appeal (confirming the decision of *Romer*, J.) that the rights of the parties are settled by the judgment, and that the mortgagor cannot redeem before the date fixed by the certificate on payment of a less sum than is named in it.

[In this country a similar decree is generally given under § 86 of the Transfer of Property Act, and it is highly probable that a similar construction will be put on the section.]

Navigable rivers—Foreshore—Right to fix moorings.

The Attorney-General at the relation of Alfred Harvey Moore and others v. Wright. [1897, II. Q. B. D. 318 C. A.]

At a particular spot in the river Thames where it is navigable, fishermen and yacht-owners have been mooring their crafts, not by casting an anchor and riding thereto, but by letting down and fixing wooden beams into the soil which form the anchor which holds the boat. These fishermen and yacht-owners have been from time immemorial using these moorings—using them when they came in, casting adrift therefrom when they went out, and when they came in again taking up the mooring as before. The lessee of the owner of the several fishery at the spot, who is *prima facie* owner of the soil underneath the fishery, attempted to levy a toll on these moorings, and on the fishermen resisting this, the lessee took the matter into his own hands, and while the crafts were lying at the moorings cut some of them adrift. In a suit by the fishermen for an injunction ;

Held: that the owner of the fishery was not the absolute owner of the soil underneath, but that he is owner subject to the common law right of all the public frequenting the sea, to pass and repass and navigate over the place in question, and, as incident to that navigation, to anchor in the ordinary mode of navigation.

Solicitor—Partnership—Costs incurred—Liability of dormant partner.

Court. *v*. Berlin. [1897, II, Q. B. D. 396, C. A.]

The plaintiff, a solicitor, was retained to recover a debt due to a partnership firm consisting of three persons, the defendants. Two of the partners were dormant partners, their names not being published to the world as partners and they themselves not taking any active part in the management of the business of the firm. The plaintiff was actually engaged by Berlin, the active partner, to bring an action against one Hyman in the firm name for a debt due to the partnership, While the action was pending, the defendants dissolved the partnership, and the dormant partners retired from the business. No notice of the dissolution of the partnership was given to the plaintiff, nor did the dormant partners do anything by way of withdrawing the plaintiff's retainer. The plaintiff did not know of the dissolution, nor did he know originally of the existence of the dormant partners, The action ended in success to the partnership and subsequently the plaintiff brought this suit against the three members of the partnership for the amount of his bill of costs in the action. Two of the defendants who were the dormant partners contended that they were not liable in respect of any costs incurred in the action subsequently to the dissolution of partnership,

Held: that the dormant partners were liable to the solicitor in respect of costs in the action incurred subsequently to the dissolution of partnership.

Vendor and purchaser—Parol evidence to explain document.

Plant *v*. Bourne. [1897, II, Ch. D. 281, C. A.]

By a contract in writing the plaintiff agreed to sell to the defendant "at the price of £5000 twenty-four acres of land, freehold, and all appurtenances thereto at Totmonslow, in the parish of Draycott, in the county of Stafford, and all the mines and minerals thereto appertaining, possession to be had on March 25th next, the vendor guaran-

teeing possession accordingly." In an action for specific performance of the contract, the defendant pleaded that the contract was void for uncertainty as the twenty-four acres were not sufficiently specified. The plaintiff proposed to let in evidence to identify the particular plot. He proposed to let in evidence to show that he was owner of 24 A. 1 R., 26 P. more or less on the south side of the highway from Totmonslow, and that at the date of the contract the defendant knew of this, and that he actually went over to the spot and examined it before entering into the contract.

Held: applying the principle of *Ogilvie* v. *Foljambe*, (1817, 3 Mer. 53) and *Shardlow* v. *Cotterell*, (1881, 20 Ch. D. 90.), that the parol evidence adduced was admissible to show what was the subject-matter of the contract. The decision of *Byrne*, J., reversed.

JOTTING AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

Fisher's Law of Mortgage by A. Underhill, Fifth Edition, published by *Butterworth & Co., 7 Fleet Street, E. C., London* (1897).

A Full and Authentic Report of the Tilak case by Setlur and Deshpande, published by *The Euducation Society Press, Byculla*, Price As. 10.

The Albany Law Journal for September (*in exchange*).
The Educational Review for September (*in exchange*).
The Calcutta Weekly Notes for September (*in exchange*).
The Allahabad Weekly Notes for September (*in exchange*).
The Green Bag for September (*in exchange*).
The Canada Law Journal for September (*in exchange*).
The Canadian Law Times for September (*in exchange*).

A somewhat extraordinary decision was pronounced by the *Chief Justice* and *Shephard*, J., in a case that came before them in appeal from the decision of the District Judge of Madura. An election was held to fill a place on the Meenatchee Temple Committee of Madura. An unsuccessful candidate, not the person who obtained the next largest number of votes, or for that matter, even a considerable number, filed a suit for a declaration that the election was invalid owing to various irregularities and malpractices and for an injunction restraining the successful candidate from taking a seat on the committee. The plaintiff

confined his case and his right of suit to his character of candidate without basing it upon his character of worshipper or voter. The Munsif dismissed the suit holding that there was no cause of action, but the District Judge on appeal reversed the decison and remanded the case for disposal on the merits. The defendant appealed against this order to the High Court under S. 588, C.P.C. The learned Judges held the Judge was right. They said it was perfectly clear to them that the plaintiff had a right of action. We are however, unable to see this. The candidate who gets the next largest number of votes may sue to be declared elected and to restrain the successful man from taking his seat; or all the voters in whom the right is jointly vested may claim that the nominee of the majority shall be entitled to the seat or some of them obtaining leave under S. 30 may claim an injunction. But it is difficult to see how a candidate even in the character of worshipper or voter can sue to unseat the successful man. When it was argued that if such a suit were allowed there might be as many suits as there were voters fighting for the successful man or against him for contradictory relief, the argument was met with the singular observation that more suits meant more revenue to Government.

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A Novel Procedure:—These are days of surprises in our High Court. The other day in a suit tried *exparte* before *Mr. Justice Benson*, it appeared that the defendant though served with a copy of the summons had not been served with a copy of the plaint as required by law. The matter was brought to his Lordship's notice, but he passed judgment in plaintiff's favour directing at the same time that the decree should not be issued, until the defendant was served with a copy of the plaint. Was the defendant to put in his written statement after service of the plaint and for what purpose? What is to become of the answer of the defendant.

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Why inheritances descend and not ascend:—The quaint reason, given by Bracton and adopted by Lord Coke, why, by the Common Law, a father cannot inherit real estate by descent from his son, is that inheritances are heavy and descend, as it were, by the laws of gravitation and cannot re-ascend. (Co. Litt. 11. 2 Bl. Comm. 212).—*The Green Bag.*

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Who is the Villain:—Curran, the Irish Advocate, was one day examining a witness and failing to get an answer, said:—"There is no use in asking you questions, for I see the villain in your face,"

"Do you, sir ? "said the man with a smile."

"Faix, I never knew before that my face was a looking glass." —*The Green Bag.*

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Charles Dickens and his clock:—Dicken's Gadshill clock, lately sold in London, was the subject of the following letter from him to Sir. John Bennett.

My Dear Sir: Since my hall clock was sent to your establishment to be cleaned, it has gone (as indeed it always has) perfectly well, but has struck the hours with great reluctance and, after enduring internal agonies of a most disheartening nature, it has now ceased striking altogether. Though a happy release for the clock, it is not convenient for the household. If you can send down any confidential person with whom the clock can confer, I think it may have something on its works that it would be glad to make a clean breast of.

Faithfully yours.

CHARLES DICKENS,

The Green Bag.

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"*How came you here?*" Said the visitor to a prisoner in the penitentiary.

"I was brought here by my convictions," was the firmly spoken reply.—*The Green Bag.*

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We take the liberty of extracting the following article from the Albany Law Journal.

Duty and Liability of Attorney to Client.

THE relation of attorney and client is one of mutual trust, confidence and good will, and the fidelity of the attorney to the client involves the most difficult questions in the consideration of this subject. That he is responsible for the want of ordinary skill, care and reasonable diligence is well understood, as is also the fact that the skill required has reference to the character of the business undertaken, but it is extremely difficult to fix upon any rule which shall define negligence in a given case. The habits and practice of men are widely different in this regard. It has been laid down that if the average degree of skill and diligence could be determined, it would furnish the true rule. "God forbid that

it should be imagined that an attorney or counsel, or even a judge, is bound to know all the law," said Lord Tenterden. Naturally, the scope of moral responsibility of the attorney to the client goes further than mere legal liability, and embraces the entire devotion to the client's interests, zealousness in the maintenance of his rights, and the exertion to the utmost of his learning and ability, and by the use of these attributes alone can the conscientious attorney be satisfied. It is possible that an attorney will maintain, with great warmth and earnestness, the side which he must know to be unjust, and the success of which will be a wrong to the opposing party, and the attorney might be considered a participator in the injustice, but he cannot be held morally responsible for the act of his client in maintaining an unjust cause. The lawyer who would refuse to lend his professional assistance to a cause on the ground that, in his judgment, the case was unjust, would usurp the functions of both the judge and the jury. It might be well to quote here the words of Lord Brougham in his celebrated defense of the queen: "An advocate," said he, "in the discharge of his duty, knows but one person in all the world, and that person is his client. To save the client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy lot to involve his country in confusion." But an attorney owes the duty of good faith and honorable dealing to the court before whom he practices; he is an officer of the court, and it is his high vocation to correctly inform it as to the law and facts of the case, and to aid it in doing justice. He is not bound to suffer false and perjured testimony to be presented with the possible result of inducing the court to take jurisdiction where there would be otherwise no power to act, and to grant a judgment or decree which the law would prohibit were the real character of the testimony known. In resorting to deception or permitting his client to do so the attorney violates his oath of office. An attorney cannot disobey the express lawful instructions of his client, and he is liable if he negligently fails to bring suit, also if, through his negligence, the papers or securities of the client are lost; but where such papers are stolen from his office, he cannot be held responsible, unless through negligence on his part.

The attorney can only undertake to avoid errors and mistakes which any prudent practitioner would avoid; and where there is a reasonable doubt as to want of skill and diligence, he cannot be held liable, and the

error being such as a cautious man might fall into, he cannot, on that account, be deprived of his fee. If, however, the attorney disregards well-established and clearly defined rules of law, or ignores the ordinary rules of court and practice, pleading and evidence, sometimes even the right construction on cases free from doubt such as bringing an action of assumpsit on a deed under the commonlaw system; if his papers are defective through lack of diligence on his part or the part of his clerks, he will be liable; and the failure to deliver a *fi. fa.* to the sheriff, whereby a levy is lost, renders him liable. Where an attorney undertaking to search the records overlooks prior liens he is liable to his client who loaned money on a mortgage of property. It is not required that the attorney should assure a client as to the result of the proceedings which he has advised, and in an action for attorney's fees it is no defense that some other course than that advised by him would have been more advantageous to the client, it appearing that the attorney acted in good faith. An attorney who is employed to draw a will is not liable to a person who, through the former's negligence and ignorance in the discharge of his professional duties, was deprived of the portion of the estate which testator instructed the attorney should be given such person by will. Where the attorney allows a cause to be called for trial without previously inquiring whether a material witness was absent, and his client was non-suited, he is liable; also where he allows judgment to be taken for want of an answer, or where he fails to appear in court when the cause is regularly reached on the docket. Where money has been collected for the client, the attorney is bound to notify him of the fact within a reasonable time; and if he does so, the client has no cause of action against him until after a demand and a refusal to turn it over. An attorney for a decedent's estate who has collected money on a claim due on the estate while acting in the employ of the administrator cannot be compelled by the Probate Court to turn over such collections under the statutory clause providing for commitment to jail of any person who refuses to surrender property belonging to a decedent after the administrator has on oath sworn before such court that the attorney has such property in his possession. The suspension of the attorney is the proper remedy. The usual remedy of a client against an attorney for neglect or misconduct is by an action on the case; sometimes, however, the courts have interfered summarily, especially where the transaction appears tainted with fraud, or where the attorney having been paid fails to perform his duty, in which event he may be proceeded against by attachment. But without some showing of fraud the court will generally leave the client to his remedy by action. In equity a distinction is drawn between fraud and negligence,

and only where the former is shown, will a court of equity interfere. In all actions against attorneys for negligence, or for want of skill, when the facts are ascertained the question of negligence or want of skill is for the jury. The actual loss sustained and not the nominal amount directly involved is the measure of damages. In showing negligence the burden of proof rests primarily upon the plaintiff, and when established, it is for the attorney to prove that the client was not injured by it. Where the acts of the attorney, in the prosecution of his client's case, are *bona fide*, an action on the case will not lie; to sustain such an action it must be shown that the acts were malicious and without foundation. If an attorney commences a suit, knowing that there is no cause of action, "dishonestly and forsome sinister view, for some ill-purpose; or for some purpose of his own which the law calls malicious," and causes a party to be arrested and imprisoned, he will be liable therefor. * * * Every consideration should induce an honest attorney to regard himself, as far as the cause is concerned, as completely identified with his client; all selfish interests should be sunk by him in respect to his one great duty to his client, that of immovable fidelity.

MORTON JOHN STEVENSON,
in the Central Law Journal.

CHICAGO, ILL.

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A Legal Laugh:—"I thought you said your old horse was not worth $10."

"Well, mebbe I did; but that was before he'd been killed by a railroad train." :—*The Albany Law Journal.*

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Edward Everett Hale tells in the Youth's Companion of James Russell Lowell's first client when he started in law. After Lowell had nervously given the client a chair, taken his hat, and sat down with his note-book to take notes on the case, he found that his visitor was a painter come to collect a bill:—*The Albany Law Journal.*

REVIEWS.

The Law of Torts by Ratanlal and Dhirajlal, published by *The Irish Presbyterian Mission Press, Surat.* Price Rs. 5 :—We are unable to see what use this book is intended to serve. It purports to be a digest of the Law of Torts containing extracts from various authors in that department of law. So far as we have been able to judge from a cursory perusal of the book, we are unable to say that there is anything original in it. Although it professes to be a book treating of the Law of Torts as applicable to this country, we find several statements in it which appear to be of questionable soundness in this country. It is said that a convict, whose sentence is in force and unexpired, cannot sue for the recovery of any property, debt or damage; that a wife cannot sue a husband for a tort, nor a husband his wife. The authors evidently appear to have had the law of England in their minds and not the law as applicable to this country. The authors appear to us, however, to have taken great pains in collecting a large mass of useful and interesting information.

Legal Maxims by P. Srinivasa Rao, 2nd edition, published by *Higginbotham and Co., Madras.*—Mr. Srinivasa Rao. is entitled to the thanks of the legal profession and of the students of comparative jurisprudence for the 2nd edition of his book on Legal Maxims. The 1st edition has become considerably out of date as it was issued as far back as 1873. But the large mass of legislation that has proceeded from the Legislature of this country during the interval has enabled the author to draw largely upon it for illustrations of the maxims which he deals with. The book is of importance to Indian students who may be unable to see in the study of such standard books as Broom's Legal Maxims their application to the laws in force in India. The treatment of the maxims is necessarily cursory, having regard to the size of the volume. We would offer one criticism upon the work which, we hope, in a future edition the author may see fit to remedy. A work of this kind is eminently suited for comparison of those rules of interpretation which are celebrated in this country as the rules of the Mimamsa. A lawyer versed in Sanskrit can point out numer-

ous parallels between the rules of interpretation contained in Jaimini's Mimamsa and the maxims dealt with in this book. We commend this book to students of law and members of the profession in this country.

Pleadings in Indian Courts by Pundit Sheo Narain, Pleader, Chief Court, Punjab, published by *The Civil and Military Gazette Press, Lahore.* Price Rs. 4:—We owe an apology to the author of this book, Mr. Pundit Sheo Narain, for our delay in noticing this volume. We entirely approve of the design of this book, though the treatment of various topics is open to great improvement. This is partly an endeavour to supply a long existing want of forms of plaints, written statements, decrees, etc., with appropriate notes briefly pointing out the bearing of the various Indian enactments upon the language and substance of those forms. We cannot say the author has been very successful in carrying out his object, but we welcome it as a first attempt in that direction.

Fisher's Law of Mortgages, 5th edition, by Arthur Underhill, M.A., LL.D., published by *Butterworth and Co.*, 7 Fleet Street, London, E. C. Price 2 *l.* 12 *s.* 6 *d.*—The law of mortgages is one of the most complicated and troublesome chapters of law both in England and in India, and the treatise of Mr. Fisher has long been recognized as the standard treatise upon the subject. The book has attained such well-deserved reputation that it is needless for us to say anything in praise of it at this time of the day. We welcome the appearance of the new edition by Mr. Underhill, who has spared no pains to increase the usefulness of the book by bringing the law up to date and supplying better facilities for reference.